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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIO CISNEROS,

Defendant and Appellant.

F058185, F058265

(Super. Ct. Nos. VCF209078 &
VCF187204)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. James Hollman, Judge.

Patricia A. Andreoni, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Fresno, California, for Plaintiff and Respondent.

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* Before Ardaiz, P.J., Levy, J. and Gomes, J.

STATEMENT OF THE CASE

Tulare County Superior Court Case No. VCF187204 (F058265)

On July 28, 2007, appellant Julio Cisneros was charged, by complaint filed in Tulare County Superior Court case No. VCF187204, with two counts of receiving stolen property (Pen. Code,¹ § 496, subd. (a)). On July 30, 2007, the parties entered into a plea agreement. Appellant waived his right to a preliminary hearing, and his constitutional rights pursuant to *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122. The court advised appellant of the consequences of an admission of guilt and, as appellant stated he was from Mexico, of possible immigration consequences. Appellant admitted a violation of probation in another case and pled no contest to count 1. Defense counsel stated there was a factual basis for the plea, and the court found an informed and voluntary waiver of rights, admission, and plea. As a result of appellant's no contest plea to count 1, count 2 was dismissed. The indicated sentence was 180 days in jail on count 1, plus 30 days consecutive for the violation of probation. Appellant agreed he could be sentenced by a different judge, and was informed that if the sentencing judge did not agree with the indicated sentence, appellant had the right to withdraw his plea.

On August 23, 2007, appellant was admitted to probation for three years, on condition, inter alia, that he serve 180 days in jail with total credits of 57 days; pay a \$500 restitution fine pursuant to section 1202.4; pay a \$500 probation revocation restitution fine pursuant to section 1202.44, which was suspended pending successful completion of probation; pay a \$20 court security fee pursuant to section 1465.8; report to the probation officer within 72 hours of his release from custody; and pay \$250 for the cost of preparation of the presentence investigation report, according to his ability to pay.

¹ All statutory references are to the Penal Code unless otherwise stated.

With respect to the violation of probation, probation was reinstated on condition that appellant serve a consecutive 30-day jail term.

On August 18, 2008, a certificate and affidavit of the probation officer was filed, stating that appellant was in violation of the terms of his probation in that he willfully failed to report to the probation officer within 72 hours after his release from custody and had failed to make any payments toward monies owed. A bench warrant issued and probation was revoked, with the basis for the violation of probation being appellant's new case, Tulare County Superior Court case No. VCF209078. On October 9, 2008, appellant was arraigned on the violation of probation, which trailed case No. VCF209078.

On October 20, 2008, appellant entered into a plea agreement that disposed of all his pending cases. As the plea and sentencing proceedings covered both cases before us on appeal, we describe additional pertinent events in conjunction with case No. VCF209078, *post*.

Tulare County Superior Court Case No. VCF209078 (F058185)

On August 27, 2008, appellant was charged, by complaint filed in Tulare County Superior Court case No. VCF209078, with felony evasion of a pursuing peace officer while driving with willful and wanton disregard for the safety of persons and property (Veh. Code, § 2800.2, subd. (a); count 1), and misdemeanor driving on a suspended or revoked license (*id.*, § 14601.5, subd. (a); count 2). It was further alleged that appellant had a prior conviction for violating Vehicle Code section 14601.5, subdivision (a).

On October 20, 2008, the parties entered into a plea agreement.² Appellant waived his right to a preliminary hearing, and his constitutional rights pursuant to *Boykin v. Alabama*, *supra*, 395 U.S. 238 and *In re Tahl*, *supra*, 1 Cal.3d 122. The court advised

² In addition to the cases before us on appeal, the agreement covered two other cases in which appellant was charged with various misdemeanors. Those cases are not pertinent to this appeal, nor is the new misdemeanor to which appellant pled no contest on May 27, 2009.

appellant of the consequences of an admission of guilt and violations of probation, and of possible immigration consequences. Appellant pled no contest to count 1, and also admitting violating his probation in case No. VCF187204. Defense counsel and the prosecutor stipulated that there was a factual basis for the plea and that the court could consider the police reports for that purpose. The court found a knowing and voluntary waiver of rights and plea. As a result of appellant's no contest plea to count 1, count 2 was dismissed. The indicated sentence was a grant of probation with one year in custody. Appellant personally entered a waiver pursuant to *People v. Cruz* (1988) 44 Cal.3d 1247, in order to be released on his own recognizance pending sentencing on November 13, 2008. Appellant agreed that he could be sentenced to the maximum term if he failed to appear for sentencing.

On November 13, 2008, appellant failed to appear for sentencing, and a bench warrant was issued for his arrest. On April 21, 2009, he appeared in court, in custody, and the matter was continued for sentencing.

On May 27, 2009, sentence was imposed. In case No. VCF209078, probation was denied, and appellant was sentenced to the upper term of three years in prison because he previously agreed to that sentence and because his crimes were increasingly serious. Appellant was awarded total time credits of 80 days. He was ordered to pay a \$500 restitution fine pursuant to section 1202.4; a \$500 parole revocation restitution fine pursuant to section 1202.45, that was suspended unless parole was revoked; a \$20 court security fee pursuant to section 1465.8; and a \$30 criminal conviction (court facilities funding) assessment pursuant to Government Code section 70373, subdivision (a)(1). In case No. VCF187204, probation was revoked and terminated, and appellant was sentenced to the middle term of two years, which was ordered to run concurrent to the term imposed in case No. VCF209078. Additionally in case No. VCF187204, appellant was awarded total time credits of 195 days, and was ordered to pay the \$500 restitution fine previously ordered, the same amount pursuant to section 1202.44, and the same

amount pursuant to section 1202.45, but with the latter suspended unless his parole was revoked. Appellant was also ordered to pay all the remaining fines and fees that previously were imposed.

Appellant filed a timely notice of appeal in each case. Upon appellant's motions, we ordered the appeals consolidated, and deemed the notices of appeal to state that "the grounds for appeal are sentencing issues, after admission of a probation violation, which do not challenge the validity of the pleas or admission."

FACTS³

Tulare County Superior Court Case No. VCF187204 (F058265)

On July 9, 2007, appellant stole 640 pounds of aluminum siphon pipe from Frank Lorenzo Ranch. Appellant took the pipes to Tulare Iron and Metal, where he recycled them. On July 13, 2007, appellant returned to Tulare Iron and Metal with another load of aluminum pipes. He told officers that he had been given permission by his landlord, Frank Lorenzo, to remove the pipe and recycle it. Officers contacted Lorenzo, who denied giving appellant permission to take the pipe. The pipes were returned to Lorenzo, and appellant was arrested.

Tulare County Superior Court Case No. VCF209078 (F058185)

At approximately 3:28 a.m. on August 20, 2008, an officer of the Tulare Police Department was on patrol when he saw a vehicle fail to stop for a stop sign at Laspina and Paige Avenues. The vehicle went through the intersection at approximately 50 to 60 miles per hour, and the officer followed. He activated his patrol car's emergency lights and siren, but the suspect vehicle failed to yield and proceeded onto northbound Freeway 99. It reached speeds of 80 to 90 miles per hour, at one point passing a vehicle on the right dirt shoulder and causing that vehicle to run off the road. The suspect vehicle exited

³ The facts are taken from the probation officers' reports filed in the two cases.

the freeway at Prosperity Avenue and continued to run stop signs, and the officer lost visual contact with it at Del la Vina.

The officer continued to check the area, and located the vehicle in the driveway of a residence on Claret Avenue. When contacted, the owner of the house said the vehicle belonged to her, and that her boyfriend's brother, Julio, had been driving it. She further stated that Julio, who subsequently was identified as appellant, was hiding in the bedroom. She gave the officer permission to enter the residence, and she pointed to a rear bedroom. The officer entered the room and found appellant trying to hide under the bed. Appellant refused to comply with the officer's orders and physically resisted, but was ultimately taken into custody.

APPELLATE COURT REVIEW

Appellant's appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the record independently. (*People v. Wende* (1979) 25 Cal.3d 436.) The opening brief also includes the declaration of appellate counsel stating that appellant was advised he could file in his brief with this court. By letter dated November 19, 2009, we invited appellant to submit additional briefing. To date, appellant has not done so. Accordingly to counsel's declaration, however, appellant requests that we address whether he entered into a valid *Cruz* waiver. In addition, we identified two reasonably arguable issues involving imposition of Government Code section 70373, subdivision (a)(1) assessments, notified the parties of our tentative conclusions thereon, and afforded the parties the opportunity to address those issues (*id.*, § 68081.)

The Cruz Waiver

We turn first to appellant's apparent claim that he did not enter into a valid *Cruz* waiver. It is not supported by the record. In *Cruz, supra*, 44 Cal.3d 1247, the parties entered into a plea agreement that specified the maximum punishment that the defendant would face. When the defendant failed to appear for sentencing, however, the trial court

announced its intent not to abide by the plea bargain, denied the defendant's motion to withdraw his plea, and imposed a greater term than that contemplated by the plea agreement. (*Id.* at p. 1249.) The California Supreme Court held that under the circumstances, the defendant did not lose the protections of section 1192.5 and must be permitted to withdraw his plea.⁴ (*Cruz, supra*, at p. 1250.) The court went on to say, however, "We do not mean to imply by this holding that a defendant fully advised of his or her rights under section 1192.5 may not expressly waive those rights, such that if the defendant willfully fails to appear for sentencing the trial court may withdraw its approval of the defendant's plea and impose a sentence in excess of the bargained-for term. Any such waiver, of course, would have to be obtained at the time of the trial court's initial acceptance of the plea, and it must be knowing and intelligent." (*Cruz, supra*, at p. 1254, fn. 5.)

In *People v. Masloski* (2001) 25 Cal.4th 1212, 1214, the California Supreme Court held that a plea agreement properly can provide for an increased sentence in the event the defendant fails to appear for sentencing. Because, in *Masloski*, the trial court listed the *Cruz* waiver as a term of the plea agreement, and the defendant clearly understood that part of the agreement was that her sentence could be increased if she failed to appear for sentencing, "[t]he provision for an increased sentence upon defendant's nonappearance

⁴ Section 1192.5 currently states, in pertinent part: "Upon a plea of guilty or nolo contendere to an accusatory pleading charging a felony, ... the plea may specify the punishment [¶] Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea. [¶] If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so."

was part of the plea agreement and not a ‘judicially imposed afterthought.’ [Citation.]” (*People v. Masloski, supra*, at p. 1223.) The state high court held that the trial court erred by failing, when it accepted the defendant’s plea of no contest, to advise her, as required by section 1192.5, of her right to withdraw her plea in the event the court subsequently disapproved the plea agreement, but found the error to be of no consequence: The trial court did not disapprove the plea agreement, but adhered to its terms by sentencing the defendant to a prison term that did not exceed the maximum sentence authorized by that agreement in the event the defendant failed to appear for sentencing. (*People v. Masloski, supra*, at pp. 1223-1224.)

In the present case, the *Cruz* waiver was clearly a term of the plea bargain, and it was just as clearly knowing and intelligent. The minutes of the October 20, 2008, hearing reflect that appellant was assisted by a Spanish-language interpreter. The pertinent part of the colloquy from that hearing is as follows:

“MR. RENDAHL [defense counsel]: I spoke with Mr. Cisneros, and ... he was gonna think over a one-year local for all cases. He would be willing to resolve the case for that indicated sentence and plead no contest and admit the violations of probation. [¶] He did ask if the court would consider an OR release or even a few days to get his apartment affairs in shape. [¶] What I suggested is he would be willing to take the maximum three or four years in prison should he fail to appear. Other than that, he’s ready to resolve the case. [¶] ... [¶]

“THE COURT: All right. The sentencing range on this charge, Count 1 is 16 months, two years or three years in state prison.... [¶] ... [¶] ... What’s your position? He’s asking that he be released OR on the condition that he will agree to be sentenced to the maximum amount of custody time if he doesn’t appear for sentencing. What’s your position on that?

“MR. RENDAHL: He wants to get his apartment and his house affairs, and *we offered* the maximum prison sentence should he fail to appear.

“MR. DENIZ [prosecutor]: With that, your Honor, the People would have no objection. [¶] ... [¶]

“THE COURT: ... [T]he District Attorney’s agreed that we can release you today on your own recognizance. [¶] I’m gonna put the matter back on calendar in about three weeks, *and as part of your plea agreement*, you are to appear at that time to be sentenced. *If you do not appear, the deal is off, and you can be sentenced to the maximum amount of custody time; do you agree to that?*

“THE DEFENDANT: *Yes.*” (Italics added.)

The court elicited from appellant that he had not been promised anything other than what the court promised, in order to get him to enter a plea; that no one had threatened him or his family; that he had had enough time to speak with his attorney; and that he was satisfied with his attorney’s advice. Defense counsel represented that he had had enough time to speak to appellant about the cases; that they had discussed appellant’s rights, defenses, and the possible consequences of the plea; and that counsel believed appellant understood his rights. After taking pleas to the various charges, the court found that appellant waived his constitutional rights, and understood the nature of the crimes charged and all the consequences of his plea. The court then referred the matter to the probation department and set November 13 as the sentencing date. The court told appellant: “I’m going to release you on your own recognizance today on these cases. *Your condition is that you appear on November the 13th. If you do not, and once you come back, you’re gonna get a lot more time than the one year.*” (Italics added.)

We are aware of no authority requiring a *Cruz* waiver to take any particular form in order to be valid. Here, the waiver was clearly a term of the plea bargain. The trial court explained to appellant what could happen if he breached that term of the plea bargain by failing to appear for sentencing. Appellant stated that he agreed to it. The record shows the waiver was knowing and intelligent and, hence, valid. Thus, any challenge to the sentence imposed pursuant to the waiver is a challenge to the validity of the plea and, as such, cannot be raised on appeal absent a certificate of probable cause. (*People v. Vargas* (2007) 148 Cal.App.4th 644, 652; see § 1237.5.) Appellant neither requested nor obtained such a certificate. The term of the plea bargain, increasing the

maximum sentence should appellant fail to appear for sentencing, was properly enforced. (*People v. Casillas* (1997) 60 Cal.App.4th 445, 451-452, 453.)

The Government Code Section 70373 Assessments

As previously stated, our review of the record revealed two issues involving imposition of Government Code section 70373, subdivision (a)(1) assessments.⁵

First, the joint abstract of judgment filed in case Nos. VCF209078 (the “A” case) and VCF187204 (the “B” case) erroneously reflects imposition of said assessment in the “B” case. Neither the minutes of the May 27, 2009, sentencing hearing nor the reporter’s transcript of that hearing reflect imposition of the assessment in the “B” case. Instead, the reporter’s transcript shows that the court ordered appellant “to pay all the remaining fines and fees that have been imposed.” No Government Code section 70373, subdivision (a)(1) assessment was imposed at the initial sentencing on August 23, 2007. Accordingly, the abstract of judgment must be corrected.

Second, the judgment in the “A” case must be modified to strike the Government Code section 70373, subdivision (a)(1) assessment. Even assuming imposition of said assessment does not violate state and federal proscriptions against ex post facto laws, and that the assessment properly may be imposed in cases in which a conviction occurred *after* the statute’s effective date of January 1, 2009 (*People v. Fleury* (2010) 182 Cal.App.4th 1486, 1488, 1490-1494; *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1413-1415; *People v. Brooks* (2009) 175 Cal.App.4th Supp. 1, 3-7; cf. *People v. Alford* (2007) 42 Cal.4th 749, 752, 754-759), here appellant’s conviction in the “A” case (and, for that matter, his conviction in the “B” case as well) occurred *before* the effective date

⁵ Government Code section 70373, subdivision (a)(1) provides in pertinent part: “To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense, including a traffic offense The assessment shall be imposed in the amount of thirty dollars (\$30) for each misdemeanor or felony and in the amount of thirty-five dollars (\$35) for each infraction.”

of the statute. In light of this fact, and since Government Code section 70373 does not contain a declaration of retroactivity and the statutory language and legislative history do not clearly indicate retroactive intent, at least beyond the date of conviction, the general presumption in favor of prospective application of statutes (§ 3; see *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243; *People v. Hayes* (1989) 49 Cal.3d 1260, 1274) is not overcome. Accordingly, the assessment cannot lawfully be imposed because appellant was convicted prior to January 1, 2009.

After independent review of the record, we conclude there are no other reasonably arguable legal or factual issues.⁶

⁶ The Legislature amended section 4019 effective January 25, 2010, to provide that any person who is not required to register as a sex offender, and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c), may accrue conduct credit at the rate of four days for every four days of presentence custody.

This court, in its “Order Regarding Penal Code section 4019 Amendment Supplemental Briefing” of February 11, 2010, ordered that in pending appeals in which the appellant is arguably entitled to additional conduct credit under the amendment, we would deem raised, without additional briefing, the contention that prospective-only application of the amendment violates the intent of the Legislature and equal protection principles. We deem these considerations raised here.

Under section 3, it is presumed that a statute does not operate retroactively “‘absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended [retroactive application]. [Citation.]’ [Citation.]” (*People v. Alford, supra*, 42 Cal.4th at p. 753.) The Legislature neither expressly declared, nor does it appear by “‘clear and compelling implication’” from any other factor(s), that it intended the amendment to operate retroactively. (*Ibid.*) Therefore, the amendment applies prospectively only.

We recognize that in *In re Estrada* (1965) 63 Cal.2d 740, our Supreme Court held that the amendatory statute at issue in that case, which reduced the punishment for a particular offense, applied retroactively. However, the factors upon which the court based its conclusion that the section 3 presumption was rebutted in that case do not apply to the amendment to section 4019. [Fn. contd.]

We conclude further that prospective-only application of the amendment does not violate appellant’s equal protection rights. Because (1) the amendment evinces a

DISPOSITION

In case No. VCF187204, the judgment is affirmed.

In case No. VCF209078, the judgment is modified to strike the \$30 criminal conviction assessment imposed pursuant to Government Code section 70373, subdivision (a)(1). As so modified, the judgment is affirmed.

The trial court is directed to prepare an amended abstract of judgment that reflects the modification in case No. VCF209078 (the “A” case), and that does not show imposition of a \$30 criminal conviction assessment (Gov. Code, § 70373, subd. (a)(1)) in case No. VCF187204 (the “B” case), and to forward a certified copy of same to the appropriate authorities.

legislative intent to increase the incentive for good conduct during presentence confinement, and (2) it is impossible for such an incentive to affect behavior that has already occurred, prospective-only application is reasonably related to a legitimate public purpose. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 [legislative classification not touching on suspect class or fundamental right does not violate equal protection guarantee if it bears a rational relationship to a legitimate public purpose].)

(The issue of whether the amendment applies retroactively is currently before the California Supreme Court in *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808, and *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963.)